



All-Star Briefing

Thought Provoking Insights That Will Keep You At The Top Of Your Game

Susan A. Powell, Ph.D.:

When it comes to trial preparation, don't short shrift the deposition process

PLI: As a trial consultant, what do you see most that weakens a lawyer's case?

SUSAN A. POWELL: The common assumption is that a jury consultant should be brought on board in the latter stages of a case in order to help "spin" the story for jurors. However, what a good trial consultant often finds at this stage of a case is that the record, developed during the process of discovery, has made the job of crafting a "sellable" message to a jury (or judge or arbitration panel) very difficult indeed. In fact, misguided depositions are frequently fundamental roadblocks in developing a consistent, concise and compelling story for any audience. The record left behind can make the ability to go forward with a winning story very difficult, and sometimes impossible.

The key weaknesses that emerge from an outsiders' perspective are twofold, both dealing with preparation: the failure of the attorney to properly prepare for the deposition, and, more dramatically, the failure to properly prepare the witness for the deposition.

First, it is frustrating to read (or watch) a deposition where the questioner is unclear as to the goals of the deposition. Key questions (or objections) are missed. If you do not know where you are going, it's very difficult to get to your destination. Meaning, an attorney is simply on a fishing expedition if he/she lacks a theory of the case, or what we consultants call case "themes" and a case "storyline." Furthermore, it is important to not only think about your story before a deposition, it is equally critical to think about your opponents' story.

Second, the witnesses must be thoroughly prepared – and they are frequently not. The most common failure is that the witness designated for the deposition has not been adequately informed as what to expect during the deposition. Almost always, the deponent has not been educated on the overall case story. This lack of knowledge is very frustrating, and sometimes terrifying, for the witness. The result is a nervous and hesitant witness who is more easily discredited by the other side. I have heard repeatedly from prospective witnesses that they have no clue as to what to expect in deposition, and have not been advised by their attorneys as to what to expect. Furthermore, witnesses are frequently ill advised, if advised at all, as to word choices, sentence structure, body language and even mode of dress. A prepared witness is a confident witness. Confident witnesses make fewer mistakes; fewer mistakes mean a cleaner case record.

As Benjamin Franklin once said, "By failing to prepare, you are preparing to fail."